

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In Re: Pork Antitrust
Litigation

File No. 18-CV-1776
(JRT/HB)

Courtroom 13E
Minneapolis, Minnesota
April 11, 2019
2:00 p.m.

BEFORE THE HONORABLE HILDY BOWBEER
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE
(STATUS CONFERENCE - VIA TELEPHONE)

APPEARANCES

For Direct Purchaser
Plaintiffs:

LOCKRIDGE, GRINDAL, NAUEN, PLLP
BRIAN D. CLARK, ESQ.
JOSEPH BRUCKNER, ESQ.
ELIZABETH ODETTE, ESQ.
100 Washington Avenue South
Suite 2200
Minneapolis, MN 55401

PEARSON, SIMON & WARSHAW
BOBBY POUYA, ESQ.
800 LaSalle Avenue
Suite 2150
Minneapolis, MN 55402

For the Consumer
Indirect Purchaser
Plaintiffs:

GUSTAFSON GLUEK, PLLC
DANIEL C. HEDLUND, ESQ.
120 South Sixth Street
Suite 2600
Minneapolis, MN 55402

HAGENS, BERMAN, SOBOL, SHAPIRO
SHANA E. SCARLETT, ESQ.
715 Hearst Avenue
Suite 202
Berkeley, CA 94710

1 For the Commercial
2 Indirect Purchaser
3 Plaintiffs:

LARSON KING, LLP
SHAWN M. RAITER, ESQ.
30 East Seventh Street
Suite 2800
St. Paul, MN 55101

4
5 For Defendant Triumph
6 Foods:

HUSCH BLACKWELL
GENE SUMMERLIN, ESQ.
13330 California Street
Suite 200
Omaha, NE 68154

7
8
9 For Defendant JBS USA:

SPENCER FANE, LLP
DONALD G. HEEMAN, ESQ.
JESSICA NELSON, ESQ.
100 South Fifth Street
Suite 1900
Minneapolis, MN 55402

QUINN EMANUEL URQUHART &
SULLIVAN
STEPHEN R. NEUWIRTH, ESQ.
SAMI H. RASHID, ESQ.
51 Madison Avenue
22nd Floor
New York, NY 10010

12
13
14
15
16 For Defendant
17 Smithfield Foods:

LARKIN, HOFFMAN, DALY & LINDGREN
JOHN A. COTTER, ESQ.
8300 Norman Center Dr.
Suite 1000
Minneapolis, MN 55437

GIBSON, DUNN & CRUTCHER
BRIAN EDWARD ROBISON, ESQ.
2100 McKinney Avenue,
Suite 1100
Dallas, Texas 75201

18
19
20
21
22 For Defendant Tyson
23 Foods:

AXINN, VELTROP & HARKRIDER, LLP
TIFFANY RIDER ROHRBAUGH, ESQ.
950 F Street NW,
7th Floor
Washington, DC 20004

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

DYKEMA GOSSETT, PLLC
DAVID GRAHAM, ESQ.
90 S. 7th Street
4000 Wells Fargo Center
Minneapolis, MN 55402

For Defendant Clemens
Food Group:

KIRKLAND & ELLIS, LLP
CHRISTINA BRIESACHER, ESQ.
300 North LaSalle
Chicago, IL 60654

For Defendant Hormel
Foods:

FAEGRE, BAKER, DANIELS, LLP
CRAIG S. COLEMAN, ESQ.
EMILY CHOW, ESQ.
90 South 7th Street
Suite 2200
Minneapolis, MN 55402

For Defendants Indiana
Packers and Mitsubishi:

DORSEY & WHITNEY, LLP
JAIME STILSON, ESQ.
50 South Sixth Street
Suite 1500
Minneapolis, MN 55402

MAYER BROWN, LLP
BRITT M. MILLER, ESQ.
71 South Wacker Drive
Chicago, IL 60606

For Defendants Seaboard
Foods, LLC, and
Seaboard Corporation:

STINSON, LEONARD, STREET, LLP
PETER J. SCHWINGLER, ESQ.
50 South Sixth Street
Suite 2600
Minneapolis, MN 55402

For Defendant Agri
Stats, Inc.:

HOGAN LOVELLS US, LLP
JUSTIN W. BERNICK, ESQ.
WILLIAM MONTS, III, ESQ.
Columbia Square
555 Thirteenth Street NW
Washington, D.C. 20004

Proceedings recorded by mechanical stenography;
transcript produced by computer.

P R O C E E D I N G S

IN OPEN COURT

* * *

THE COURT: Good afternoon. This is Judge Bowbeer. We are on the record in the matter of In Re Pork Antitrust Litigation. It sounds like we have a few more people joining us. This is Civil Matter No. 18-CV-1776. And, for the record, we are holding this case management conference by telephone; although, I am joined here at the courthouse by our court reporter. I'm going to wait just another minute or two to see if we get any more people calling in and then I'll call roll.

All right. Let's see if that's our full complement of participants here. Let me start by asking everyone at any point if you speak during this telephone conference, even if you think we must recognize your voice by now, please introduce yourself again every time you speak. That way we can be sure that we get a good, clear record and we attribute the right statements to the right people.

Let's start by getting appearances. Since I've got a list of the people I think are going to be on the call, I'm going to go through those names, with apologies in advance for any mispronunciations, and ask you to speak up when you hear your name. And when I get through for any

1 particular set of parties, then I'll ask if there's anyone
2 on the phone whose name I didn't call and whose appearance
3 should be noted.

4 So let's start with appearances for the
5 plaintiffs. I have on behalf of the Consumer Indirect
6 Purchaser Plaintiffs first Daniel Hedlund.

7 MR. HEDLUND: Good afternoon, Your Honor. I'm
8 here.

9 THE COURT: Shana Scarlett.

10 MS. SCARLETT: Good afternoon, Your Honor.

11 THE COURT: Shawn Raiter.

12 MR. RAITER: For the Commercial Indirects, Your
13 Honor, yes.

14 THE COURT: Correct, and I was just about to
15 switch. So Shawn Raiter for the Commercial Indirect
16 Purchaser Plaintiffs.

17 And then on behalf of the Direct Purchaser
18 Plaintiffs I have Brian Clark.

19 MR. CLARK: Yes, Your Honor.

20 THE COURT: And Bobby -- is it Pouya?

21 MR. POUYA: Yes. It's Pouya. Good afternoon,
22 Your Honor.

23 THE COURT: Good afternoon.

24 Is there anyone else on the phone for any of the
25 plaintiff groups?

1 MR. BRUCKNER: Yes, Your Honor. Joe Bruckner,
2 also here for the Direct Purchaser Plaintiffs.

3 THE COURT: Okay.

4 MS. ODETTE: Elizabeth Odette for the Direct
5 Purchaser Plaintiffs.

6 THE COURT: Anyone else for any of the plaintiff
7 groups who'd like to have their appearance noted?

8 All right. Let's turn then to the defense
9 counsel. First on behalf of Agri Stats I have William
10 Monts.

11 MR. MONTS: Good afternoon, Your Honor.

12 THE COURT: Justin Bernick.

13 MR. BERNICK: Good afternoon, Your Honor.

14 THE COURT: Anyone else for Agri Stats?

15 MR. MONTS: No, Your Honor. That's all of us.

16 THE COURT: Okay. For the Clemens Defendants, I'm
17 going to massacre this name, so I'm going to let you speak
18 it.

19 MS. BRIESACHER: Your Honor, that's okay. It's
20 Christina Briesacher. Good afternoon, Your Honor.

21 THE COURT: Good afternoon. And, Ms. Briesacher,
22 are you expecting anyone on behalf of your clients?

23 MS. BRIESACHER: Nope.

24 THE COURT: Okay. On behalf of the Hormel
25 Defendants I have Craig Coleman.

1 MR. COLEMAN: And I'm present, Your Honor.

2 THE COURT: And Emily Chow?

3 MS. CHOW: Yes. Good afternoon, Your Honor.

4 THE COURT: Anyone else for Hormel?

5 MR. COLEMAN: No, Your Honor.

6 THE COURT: Indiana Packers Defendants, I have
7 Britt Miller.

8 MS. MILLER: Present, Your Honor. Good afternoon.

9 THE COURT: Jamie Stilson.

10 MS. STILSON: I'm on as well, Your Honor. Good
11 afternoon.

12 THE COURT: And are you expecting anyone else on
13 behalf of Indiana Packers?

14 MS. STILSON: We are not, Your Honor.

15 THE COURT: Okay. On behalf of JBS USA, Sami
16 Rashid.

17 MR. RASHID: Yes, Your Honor. Good afternoon.

18 THE COURT: Good afternoon.

19 Steven Neuwirth.

20 MR. NEUWIRTH: Good afternoon, Your Honor.

21 THE COURT: Donald Heeman.

22 MR. HEEMAN: Good afternoon, Your Honor.

23 THE COURT: Jessica Nelson.

24 MS. NELSON: Good afternoon, Your Honor.

25 THE COURT: And are you all expecting anyone else

1 to appear for JBS?

2 MR. HEEMAN: No, we're not, Your Honor.

3 THE COURT: For the Seaboard Defendants I have
4 Peter Schwingler.

5 MR. SCHWINGLER: Good afternoon, Your Honor.

6 THE COURT: Good afternoon. And are you expecting
7 anyone else to appear for your client?

8 MR. SCHWINGLER: I am not.

9 THE COURT: Smithfield Foods, Brian Robison.

10 MR. ROBISON: Good afternoon, Your Honor. Here.

11 THE COURT: Richard Parker?

12 MR. ROBISON: Your Honor, this is Brian Robison
13 again. I don't think he's going to be able to join our
14 group.

15 THE COURT: Okay. John Cotter.

16 MR. COTTER: Good afternoon, Your Honor.

17 THE COURT: Anyone else for Smithfield?

18 MR. ROBISON: No, Your Honor.

19 THE COURT: Triumph Foods, Gene Summerlin.

20 MR. SUMMERLIN: Yes, Your Honor. And Megan
21 Scheiderer, I think, is identified as participating, but she
22 is traveling and doesn't have cell service right now. So it
23 would just be me for Triumph.

24 THE COURT: All right. Very well.

25 And on behalf of the Tyson Defendants I have

1 Tiffany Rohrbaugh.

2 MS. ROHRBAUGH: Yes, Your Honor.

3 THE COURT: And David Graham. I'm not hearing --

4 MS. ROHRBAUGH: He couldn't attend, Your Honor --

5 MR. GRAHAM: I'm here, Your Honor. I'm sorry.

6 THE COURT: Okay. Very well. We've got

7 Mr. Graham.

8 And are you expecting anyone else on behalf of the
9 Tyson Defendants?

10 MS. ROHRBAUGH: No, Your Honor.

11 THE COURT: Is there anyone else on the phone who
12 wants their appearance noted and whose name I have not
13 called? Apparently not. All right.

14 So we've got an agenda. And, again, just one more
15 reminder when you speak on a particular topic to make sure
16 you identify yourself first even though you have identified
17 yourself before.

18 So I've got the parties' status report for this
19 conference. It's my understanding from the status report
20 and from the lack of anything else filed following the
21 status report that that is the only thing that is on file in
22 connection with this conference. I'm referring to Docket
23 No. 314.

24 Is there anything that you all thought you filed
25 or brought to my attention beyond that status report?

1 MR. CLARK: Your Honor, Brian Clark speaking for
2 plaintiffs. No, I don't believe there is anything else.

3 MR. ROBISON: Your Honor, Brian Robison for the
4 defense side. We agree there's nothing else.

5 THE COURT: All right. Very well.

6 And just to address one thing regarding the format
7 for these conferences. In general -- and I know there was a
8 bit of a difference of opinion on this particular
9 conference -- in general, I do intend to make these
10 conferences in person although to make a call-in number
11 available for whoever would like to participate that way.
12 As you might imagine, the reason I decided to make it
13 exclusively a telephone conference this time was because of
14 the weather coming in, and it just seemed like the smartest
15 thing to do all the way around. But for future planning,
16 although you're always welcome to suggest a telephone-only
17 conference, my default mode will be an in-person conference
18 with telephone availability.

19 I see a couple of issues that the parties want to
20 address in the course of the conference, but let me start
21 simply by asking, first on behalf of the plaintiffs and then
22 on behalf of the defendants, whether there's anything more
23 you'd like to report by way of fleshing out the status
24 report about the progress you've made since our last status
25 conference or progress that you've made since you submitted

1 your status update. So let's start first with the
2 plaintiffs. Unless you tell me otherwise, I will take you
3 in the order in which you identified yourselves in your
4 letters. So that would be first on behalf of the Consumer
5 Indirect Purchaser Plaintiffs. Anything you want to bring
6 to my attention by way of fleshing out the status report and
7 before we get to the disputes?

8 MR. HEDLUND: Your Honor, Dan Hedlund. I believe
9 Ms. Scarlett and I have designated Mr. Clark as our
10 spokesperson on behalf of all plaintiffs, so we'll turn it
11 over to him.

12 THE COURT: All right. Mr. Hedlund, it sounds
13 like you're going to cede the floor to Mr. Clark, but my
14 court reporter tells me she was having a little trouble
15 hearing you clearly, so if you do want to speak up again as
16 the call goes on, then make sure that you get a little
17 closer to the phone or speak up a little more or both.

18 Mr. Raiter.

19 MR. HEDLUND: Will do.

20 THE COURT: That's perfect. That's much better.

21 Mr. Raiter, are you also ceding the floor to
22 Mr. Clark for purposes of any updates?

23 MR. RAITER: Yes, Your Honor, we are.

24 THE COURT: All right. So, Mr. Clark, the podium,
25 so to speak, is yours.

1 MR. CLARK: Hello, Your Honor. The podium is
2 mine, but I actually don't have much more to report beyond
3 the status conference you said there. And, just to be
4 clear, kind of the two issues we hoped to get some guidance
5 with so we had some guideposts to keep things moving over
6 the coming months were some guidelines and dates for us all
7 to shoot for on document custodians, and also kind of
8 flagging an issue that often comes up prior to identifying
9 document custodians, the phone records with the carriers,
10 just making sure there's specific identification of who
11 might have relevant phone records with the expected
12 custodians or I've been shooting to have those identified
13 within the next month or two, and then actual contact with
14 the carriers about those records because they each have a
15 seven-year rolling deletion policy is our experience. So
16 each month that we wait to get those identified and
17 preserved they're deleted. So that's just a concern we
18 have. And we'd like to move as quickly as we can on that in
19 the next month or two.

20 THE COURT: Okay. Let me ask just so I understand
21 kind of what the status of this discussion is, and then
22 obviously we'll be interested in some further conversation
23 from both sides on this, but one of the things that the
24 defendants raised in their response in the status report,
25 particularly with respect to the guidelines and dates for

1 custodians, was a concern that there had not been a full
2 meet and confer on this subject before the letter was sent
3 in.

4 I still want to hear from both sides on this, but
5 let me just ask you, Mr. Clark, whether there's been any
6 kind of a meet and confer on this topic and any positions
7 exchanged on it since the letter was written?

8 MR. CLARK: You know, we haven't had any
9 discussions since the letter was written. We saw that
10 statement from the April 4th status letter, and we
11 understand -- we're willing if 60 days doesn't work and it
12 needs to be 90, we're happy to discuss that. But with
13 respect to document custodians and also, of course, moving
14 along the individual discussions about objections and offers
15 of production for the Rule 34 requests, our position is it's
16 kind of just the natural flow of this process we're going
17 through here. Prior to the word on the motion to dismiss is
18 to make some progress we have to continue with those tasks
19 and we ought to have some guidelines in doing so.

20 The specific answer to your question, no, there
21 has not been any further discussions since April 4th and
22 we're quite happy to have them.

23 THE COURT: Okay. Mr. Robison, let me ask you
24 first the more kind of overarching question: Anything by
25 way of additional status report? Before we get into the

1 specific areas of disagreement, anything else that the
2 defendants wanted to flesh out in terms of how the
3 conversations are going and what kind of progress has been
4 made since we last met in January or does the letter pretty
5 much sum it up?

6 MR. ROBISON: Your Honor, Brian Robison for the
7 defense group. Thanks for the chance to embellish a little
8 bit on what the parties submitted last week. There are some
9 things that I think would be helpful to lay out here just to
10 give you, again, kind of a level set on where we are and the
11 progress the parties have made. It didn't really fit in
12 that submission last week, but I think it would help you
13 maybe to understand exactly where things stand.

14 The parties have made substantial progress, we
15 believe, in preparing for discovery if we have to get into
16 discovery down the road. The Court has set deadlines for
17 various tasks to be accomplished over the last few months
18 and the parties have hit every single one of those
19 deadlines. If you had a list in front of you of the tasks
20 you had assigned us, Your Honor, you would be able to put a
21 red check mark next to each one of them.

22 Just by way of example, you had ordered the
23 parties to exchange organization charts and initial
24 disclosures on December 3rd, and the parties have done that.
25 You ordered the parties to submit a revised ESI protocol on

1 February 18th reflecting some of your rulings, as well as
2 some more results of the meet and confers that we've had on
3 that, and we did that. And the Court has now entered an ESI
4 protocol. You ordered the parties to exchange ESI
5 disclosures, and the parties did that on March 8th. You
6 ordered the defendants to respond to 32 of the plaintiffs'
7 Rule 34 document requests with initial objections and
8 responses with some statements that are about how the
9 motions to dismiss might affect eventual productions, and
10 the defendants did that as well. And those were served, I
11 believe, on March 29th. We had a previous meet and confer
12 on those document requests on March 8th as well -- before
13 March 8th, I think it was March 6th.

14 So the parties have moved forward on the
15 disclosures, the organization charts, the ESI disclosures,
16 meeting and conferring for our first round of discussions on
17 the document requests. The defendants have now served their
18 initial objections and responses to the document requests.
19 So all of this information we think sort of informs the
20 discussion today and reflects the progress the parties have
21 made, the deadlines the Court has set, the deadlines the
22 parties have met. And we are certainly ready to discuss the
23 two issues -- I'm not sure they're even disputes yet, but
24 the two issues that are highlighted in the submission the
25 parties made last Thursday.

1 THE COURT: Okay. Good. Thank you. I appreciate
2 that additional detail.

3 Mr. Clark, anything relating to or responsive to
4 that that you want me to hear before we turn to the first of
5 the two topics that you wanted to discuss in a bit more
6 detail?

7 MR. CLARK: No, Your Honor.

8 THE COURT: Okay. All right. Well, let's then go
9 to the issue raised by the plaintiffs. I guess it's in the
10 section called plaintiffs' further statement relating to the
11 custodians, defendants' custodians, and responses and
12 objections.

13 Mr. Clark, I've read the comments that the
14 plaintiffs made in that section. I obviously have also read
15 the defendants' comments. So anything more that you want to
16 discuss with me before I give Mr. Robison a further chance
17 to amplify on the defendants' remarks?

18 MR. CLARK: Just a brief comment, Your Honor. To
19 us a discussion about document custodians is really part of
20 their discussions about objections and offers of production
21 in response to Rule 34 requests, which we'll be doing
22 anyways.

23 In our experience in talking through each request,
24 it's most efficient and logical to discuss the document
25 sources for each. For instance, the discussion is, well, do

1 you have a file about this topic that's in, you know, for
2 antitrust compliance policies it might be in the Legal
3 Department, et cetera. So as you talk through each request,
4 it's usually most efficient to talk about the document
5 sources and whether you might be using a custodian search
6 for a specific request or a custodian search and centralized
7 sources like a network folder and to have that discussion
8 knowing the document custodians is often a pretty critical
9 piece of discussion to make those discussions fruitful.

10 So with respect to the discussions about Rule 34
11 requests and objections, we think it's fairly important to
12 have some schedule laid out for defendants in the first
13 instance to disclose their proposed document custodians, and
14 then plaintiffs to respond, and then if there's any dispute
15 about those some type of timetable to raise those disputes
16 with the Court.

17 THE COURT: Okay. And, obviously, I will give
18 Mr. Robison a chance to speak for himself on this, but was
19 there any discussion among you, either before or after this
20 letter was written, where an exchange of possible deadlines
21 or time frames was discussed or is this status conference
22 kind of the first discussion of that sort that you'll have
23 had?

24 MR. CLARK: Your Honor, this is Brian Clark again.
25 The 60-day proposal is what we made to defendants. I think

1 the -- probably I think it was April 1st or March 31st, a
2 few days before the deadline to submit the actual status
3 report. We have not heard a counterproposal. We're
4 certainly willing to entertain it, but certainly something
5 in the range of 60 days, maybe if an extra month is needed I
6 think we're amenable to it. We're lawyers. We need
7 deadlines. So our view is we ought to have some type of
8 deadlines, and we're amenable to discussing something if 60
9 isn't workable for whatever reason.

10 THE COURT: Okay. All right. Mr. Robison, I know
11 from your letter that there was some concern about not
12 having had as much meeting and conferring as you would've
13 liked to have had before it came to this, but the letter is
14 now about a week old, so tell me your response both to the
15 -- well, tell me your response to the proposal that the
16 plaintiffs are making and both about whether there ought to
17 be deadlines, which it strikes me that deadlines typically
18 are helpful in a situation like this, and also if there are
19 deadlines whether the ones that the plaintiffs have proposed
20 make sense or something else ought to be considered.

21 MR. ROBISON: Thank you, Your Honor.

22 We, on the defense side, have had a chance to talk
23 now internally about what we saw last Thursday, and here's
24 how we are assessing what the plaintiffs were talking about
25 here. The way we see their proposal, it really breaks down

1 into two pieces. And we can wholeheartedly agree with the
2 first piece. It's the second piece we object to. The two
3 pieces as we see it are this: number one, they want to set
4 up a schedule for exchanging custodian lists, and then
5 counterproposals, and then a time period to discuss who the
6 proper document custodians should be. And that piece of
7 their proposal we are fully prepared to handle. We're
8 prepared to talk about dates for exchanges today. We have
9 no problem with that.

10 We are ready to talk about potential custodians.
11 We don't think we'll be able to reach final agreement while
12 we're still waiting for the rulings on the motions to
13 dismiss, but we can certainly make some progress and so we
14 are fully prepared to do that.

15 These negotiations on custodians have not yet
16 started. As I said before, we had served our initial
17 disclosures in December. We served organization charts in
18 December. And the parties have not yet talked about those
19 productions in December.

20 And then in early March, we answered the ESI
21 interrogatories and produced still more information about
22 possible custodians and document sources, and the parties
23 have not yet had a chance to talk about those.

24 So, like I said at the outset, the parties have
25 made a lot of progress in getting ready for discovery. The

1 defendants have cooperated at every step of the way and
2 we're willing to do so here as far as custodians as we're
3 talking to them about document requests. We think it ought
4 to be mutual, by the way, reciprocal, so that we're talking
5 about plaintiff custodians at the same time. We can talk
6 about that in a second.

7 The second piece, however, the part that we have a
8 problem with, and that is this idea that in 60 days parties
9 are going to reach an impasse and then we hurry up and file
10 motions to compel, I guess, on document requests and on
11 custodians. It wasn't clear to us on the papers whether
12 they were envisioning motions to compel and document
13 requests and custodians both, but it sounds like today they
14 are. But we think it's premature to be talking about filing
15 motions to compel and having discovery motions before
16 discovery even starts. We think it's putting things
17 completely out of order to start discovery with motions to
18 compel.

19 So our thought would be we exchange dates today
20 for initial custodian lists, counterproposals, maybe
21 starting next week with initial lists, a week or two after
22 that for counters, and then we have 60 days after these
23 exchanges -- 60 or 90 days for negotiations. And then at
24 that point, instead of hauling off with motions to compel,
25 at that point, 60 or 90 days out, we would have another

1 status conference and report to you on the progress we've
2 been able to make on custodians. We think that, number one,
3 provides structure. It does provide deadlines. But it
4 doesn't have the prospect of all of us briefing motions to
5 compel when 60 or 90 days from now we may still not have
6 rulings on the motions to dismiss.

7 So we think it is premature for the Court to try
8 to prejudge those motions and figure out what the case is
9 about, what's relevant, which custodians are relevant,
10 proportionality, date range, all those sorts of things that
11 I would imagine would get teed up if we had to brief motions
12 to compel while we're still waiting on the rulings on the
13 motions to dismiss. It requires a lot of guesswork on the
14 parties and some extended guesswork on the Court's part.

15 So our thought is let's go ahead and set dates for
16 exchanging custodian lists. Let's set a 60- or 90-day time
17 period to negotiate, get as far as we can on custodians, and
18 then we report to you, Your Honor, on the progress we've
19 made, but we not have this idea of motions to compel hanging
20 out there while we've got motions to dismiss still pending
21 that may dismiss certain parties or certain pieces of the
22 case.

23 THE COURT: All right. I think I have that down
24 both in terms of the kind of time frame you're talking about
25 and -- just to make sure I heard you correctly, kind of

1 rewinding it just a bit, you were talking about being ready,
2 and your proposal would be on both sides, to exchange lists;
3 in other words, defendants propose their custodians,
4 plaintiffs propose their own custodians within a couple of
5 weeks. And then had you proposed a deadline for a
6 responsive list following that?

7 MR. ROBISON: Your Honor, our thought -- and,
8 again, this is just for defense side -- our thought was we
9 could be prepared to exchange the initial list going both
10 ways next Thursday, the 18th, if that works for the
11 plaintiffs, and then considering this is the start of
12 custodian negotiations maybe have two weeks for the parties
13 to respond.

14 So if we're playing that out, it would be May 2nd
15 would be the date for both sides to send their
16 counterproposals on custodians. And then the clock for
17 negotiations would start from May 2nd and go until, I guess,
18 July 2nd or August 2nd for another status conference with
19 Your Honor.

20 THE COURT: Okay. Good. I'm glad I asked. I had
21 conflated the two things into that two-week period. All
22 right. Okay.

23 So, Mr. Clark, you've now heard a counterproposal,
24 so let me hear a little more from you.

25 MR. CLARK: Sure. I think, generally, the concept

1 with respect to the requests plaintiffs have made to
2 defendants for documents and the custodians that defendants
3 just laid out is amenable in coming back to the Court if you
4 are available in about a 60-day time period would be useful.

5 I think the two issues I heard was the first we
6 have heard about requests for production or interest in
7 document custodians from plaintiffs is right now. Why
8 that's probably a little bit problematic is because
9 defendants haven't served any document request on any
10 plaintiff that I am aware of. I certainly haven't seen
11 them. That issue had not been raised. We have just been
12 proceeding with requests for discovery to defendants. We
13 are, of course, happy and we understand our obligations to
14 respond.

15 It might make a lot more sense to do a separate
16 track now that defendants are expressing an interest in
17 discovery from plaintiffs if we agree on a -- defendants can
18 serve the requests whenever they'd like, frankly. We'll
19 respond to them in due course on kind of a similar schedule
20 defendants had to respond. And then I think after that,
21 again, if we can certainly work out a schedule when
22 plaintiffs in the first instance would propose custodians
23 relevant to those document requests. We can't really
24 identify the custodians until we know what specifically has
25 been requested. We're happy to do that, and probably

1 something equivalent to the schedule we're working on here
2 for plaintiffs to request for defendants. So that's the
3 first issue, is the issues are not at the same place because
4 there haven't actually been discovery requests to
5 plaintiffs.

6 The other issue on just kind of -- I don't think
7 -- I don't know and I need to look back whether we've
8 mentioned motions to compel. Typically, actually, how we've
9 handled kind of document custodian disputes is more in the
10 nature of a joint letter brief so the parties can -- you
11 know, you do an initial exchange once they have teed up a
12 dispute on particular custodians and then do a final
13 exchange so they kind have had the back and forth, and often
14 that helps resolves the issues.

15 I think plaintiffs are perfectly happy to have a
16 status conference with the Court in about 60 days where we
17 raise perhaps if there's general categories of disputes
18 about particular custodians for instance, just sampling the
19 idea for a very low-level type of person. Those kinds of
20 issues might be helpful to get some guidance from the Court
21 60 days out. And then we might be able at that time to have
22 a conversation for disputes that we think are intractable
23 how you would like us to present those to you.

24 We don't think it's appropriate to wait until a
25 motion to dismiss order comes out, because otherwise there's

1 no real incentive for both parties to work through the
2 issues, find some common ground, and then resolve them.

3 THE COURT: I'm just catching up with you in my
4 notes. Just a second.

5 Mr. Robison, just to follow up on the point that
6 Mr. Clark made that written discovery directed to the
7 plaintiffs hasn't been served yet and therefore the table
8 hasn't yet been set in quite the same way for a discussion
9 about the plaintiffs' own custodians, that argument has some
10 allure to me. Tell me why you would view that differently,
11 if you do.

12 MR. ROBISON: Your Honor, it's certainly a good
13 question. He's right, we have not sent document requests to
14 the plaintiffs. They have served us with disclosures, and
15 org charts, and some subset of the ESI disclosures. So it
16 seems like -- the defense group can talk about this some
17 more, but it seems like there is enough out there that we
18 could at least start the conversations. The plaintiff
19 started this case, plaintiffs have made allegations, and I
20 would think the plaintiffs would be able to tell us proper
21 custodians who have documents that we can all imagine would
22 be relevant -- contracts for buying pork, communications
23 with pork suppliers, negotiations over pork pricing, those
24 sorts of things.

25 So I'm not sure that we literally can't make any

1 progress and can't do any talking until they see document
2 requests. That's something maybe we on the defense side can
3 discuss among ourselves and then talk to them further. But
4 I'm just not convinced that we're completely unable to start
5 these talks without them seeing document requests.

6 We may not -- again, I don't think we're going to
7 be able to reach final agreement on custodians for the
8 defendants or final agreement on objections for the
9 defendants while the motions are still outstanding. So we
10 certainly wouldn't be able to do that with the plaintiffs
11 either, but I think we would be able to make progress. If
12 we need to serve document requests -- if they just can't
13 talk to us at all without seeing document requests for
14 documents that I think they can imagine are coming, then we
15 on the defense side will figure out whether and when we want
16 to serve our requests.

17 THE COURT: Okay. All right. Anything further on
18 this topic, Mr. Clark?

19 MR. CLARK: No, Your Honor. I think we're not
20 looking to hold things up, but just given the posture that
21 we don't have a document request, I mean, that's literally
22 how we frame where we're looking for information that's
23 requested, it's in response, because we're the responding
24 party. It just seems to move everybody to actually know
25 what's being requested. There are different types of things

1 pursued by various defendants in different cases that may or
2 may not be pursued here. We can endeavor to on a more
3 accelerated schedule identify those document custodians once
4 we have the requests. I think we'll have to have them in
5 order to know what we're responding to and where we have to
6 look for documents and who might have those documents.

7 THE COURT: All right. Okay. Well, let's start
8 then with the issue of identifying defendants' custodians,
9 and then I'll turn to the issue of identifying plaintiffs'
10 custodians. Well, let me ask -- well, no, I think we've
11 largely got agreement here. The defendants have indicated
12 that they'd be in a position to serve initial lists by the
13 18th.

14 Mr. Robison, I assume that that proposal was based
15 on conversations you've had with the defense group generally
16 and wasn't speaking strictly for just your own clients. Is
17 that correct?

18 MR. ROBISON: Yes, that is correct.

19 THE COURT: Okay. And so let's go ahead and put
20 that date in place.

21 Mr. Clark, I didn't hear any opposition to the
22 idea that the plaintiffs would respond with a
23 counterproposal about defendants' custodians within a couple
24 of weeks after the 18th, which would bring us to May 2nd.

25 MR. CLARK: No, Your Honor. That schedule seemed

1 just fine to us.

2 THE COURT: All right. And then meeting and
3 conferring to commence promptly thereafter. And I do think
4 it makes sense for us for a number of reasons, but also by
5 way of follow-up on this topic, to schedule another status
6 conference for about 60 days after May 2nd. And then in
7 connection with your updates and position papers for the
8 status conference you can let me know where you are seeing
9 issues. You can identify issues on which you'd like
10 guidance.

11 And I think, as Mr. Clark may have put it, if
12 there are issues that seem a bit more intractable where it
13 looks like at least one side or the other wants to urge me
14 to weigh in in a more definitive way, then we can talk at
15 that conference about whether and how to set that up. I
16 think it will depend a bit on -- well, 60 days from May 2nd,
17 I wouldn't be surprised if you would have a decision from
18 Judge Tunheim by then. I don't have any insider information
19 to that effect, but I wouldn't be surprised to see a
20 decision on the motion to dismiss by that point. And,
21 obviously, that could reframe the timing conversation in any
22 event.

23 So let's just plan on a status conference. So
24 we're looking at, oh, good, 4th of July. How do you all
25 feel about a status conference right around the 4th of July?

1 Probably not so good. We can shoot for either the week of
2 June 24th, which would be the full week prior to 4th of July
3 week, or probably the week of July 8th, which would be the
4 full week after 4th of July week. I don't think I will make
5 you show your dedication to the cause by demanding that we
6 set a status conference for 4th of July week.

7 So, Mr. Clark, any strong feelings on the
8 plaintiffs' part about when we set that next status
9 conference vis-a-vis the 4th of July?

10 MR. CLARK: Sure. I think earlier in the week of
11 June 24th would probably help avoid a lot of the travel plan
12 type of issues, like June 24th or 25th, for anybody, you
13 know, taking off a little bit early before the July 4th week
14 would probably work well.

15 THE COURT: Okay. Mr. Robison.

16 MR. ROBISON: Your Honor, I, frankly, do not know.
17 Our group has been talking about a July 2nd date. So I do
18 not know. I know the week of July 8th is bad for several of
19 us. I don't know about the week of June 24th. I know there
20 are certain days that week that are bad for me personally.

21 THE COURT: You know, I can do -- I mean, I'm
22 trying to be thoughtful about all of your schedules. I can
23 do a conference on July -- actually, on July 1st or July
24 2nd.

25 So why don't you all chat among yourselves after

1 we're done with this conference. I could do June 24th. It
2 would be tough for me without rearranging things. If I
3 rearranged something, I could potentially do June 25th. But
4 those are really the only two days that week, and the 24th
5 is a definite preference or I could do July 1st or July 2nd.
6 I would not want to get any closer to 4th of July just, as I
7 say, trying to be sensitive to everybody else's schedules.
8 And then the week of July 8th I could do the 8th, 10th -- it
9 looks like I could do pretty much any day the week of July
10 8th except for the 9th.

11 So why don't you all talk first among your
12 respective groups and then talk across the net to each other
13 and given those options see if you can agree on a date that
14 kind of meets the most people's needs. If you can't, then
15 let me know where things fall apart and I'll just make a
16 decision. But let's see if you can come up with one of
17 those dates that looks like it will work for the people who
18 need to be -- particularly the people who will want to be
19 here in person and would therefore need to travel to do
20 that. Okay?

21 MR. ROBISON: That works for the defense side,
22 Your Honor. Thank you.

23 MR. CLARK: Brian Clark, Your Honor. Yes, that
24 works well. Thank you.

25 THE COURT: Okay. With respect to the plaintiffs'

1 custodians, I do get Mr. Clark's point that there is a
2 distinction to be made because the defendants have not yet
3 served responses. That being said, I do think that there's
4 been enough legwork done even with respect to identifying
5 the organization, and issues, and that kind of thing on the
6 plaintiff's side that I think you all ought to be in a
7 position to start considering custodians and pretty quickly
8 after service of actual written document requests ought to
9 be in a position to get those over to the defendants.

10 I know, Mr. Robison, you said you hadn't had a
11 chance really to talk to your group yet about how quickly
12 you wanted to get written requests out, but my inclination
13 would be to set a deadline of two weeks after you serve
14 written requests by which the plaintiffs would need to get
15 their proposed list to you and then a fairly comparable
16 schedule from there, which means we may or may not be in a
17 position to -- we'll at least be ready for a status
18 conference on the subject by that early July date, although
19 the meet and confer perhaps won't have progressed as far
20 along as for the defendants. But just to get that process
21 started, Mr. Robison, any reason why you all couldn't get --
22 at least understanding you haven't had a chance to talk to
23 the rest of your group, how would you feel about just saying
24 that within two weeks after you get those written requests
25 served plaintiffs should get their own proposed custodians

1 over to you?

2 MR. ROBISON: That sounds fine to us.

3 THE COURT: Okay. Mr. Clark, have I put you in
4 what you believe is a completely untenable position or given
5 what you already know does that sound like a deadline you
6 all could meet?

7 MR. CLARK: Your Honor, we'll make it work, yeah,
8 as long as we have a couple weeks, as you've suggested, to
9 look at requests for production, we'll propose custodians.
10 And then, of course, I assume we'll have the typical 30 days
11 to get the objections and responses to the Rule 34 requests,
12 unless you're suggesting otherwise?

13 THE COURT: No. Otherwise the 30 days -- I don't
14 mean to accelerate anything else beyond what the rules would
15 ordinarily provide, but just set that two-week deadline
16 based on those written requests to get a list of proposed
17 custodians over, and then two weeks from that date then for
18 the defendants to counter with a meet and confer to follow.

19 MR. CLARK: That won't be a problem. We'll make
20 it work, Your Honor.

21 THE COURT: Okay. All right. And then I will
22 want a status report on that process as well by that late
23 June/early July status conference. But I do understand that
24 given that it will be starting a bit later, you may not be
25 quite as far along in your meet and confer process, but

1 obviously the more you can get done by that status
2 conference, the better my ability to weigh in and provide
3 some guidance that will keep you moving forward. Does that
4 work?

5 MR. CLARK: Yes, Your Honor.

6 THE COURT: All right. So let's turn next to the
7 issue of telephone records. As I understand the concern
8 here -- and, Mr. Clark, you described it in your letter and
9 also previewed it a bit in your remarks a few minutes ago --
10 but it sounds like the driving concern here is that the
11 telephone providers have a seven-year -- typically have a
12 seven-year retention period for phone records, and the
13 concern is that if the phone numbers have not been disclosed
14 and sort of concomitantly some assurances provided that as
15 to each of those numbers the provider has been contacted and
16 told to hold the records your concern is that some of these
17 records may be destroyed by the providers pursuant to their
18 usual retention policy in the meantime. Am I capturing your
19 concern accurately?

20 MR. CLARK: Yes, Your Honor. And typically the
21 way we've dealt with it in other cases is once there's a
22 better idea, which we'll have -- at least defendants will
23 have through their custodians by April 18th a sense of who
24 are the likely custodians -- typically a letter to the
25 carrier requesting specific phone numbers, have the records

1 retained or providing account numbers is sufficient. It is
2 a case -- only in the case a carrier says, well, we need a
3 subpoena not for production but just requesting
4 preservation, occasionally with some smaller carriers that's
5 necessary, but for AT&T and Verizon typically a letter is
6 enough.

7 THE COURT: Okay. So, Mr. Robison, I know that
8 the defendants' section said, look, the defendants are
9 complying with document preservation obligations. Of
10 course, the thought bubble over your head about what that
11 means with respect to phone records may be different from
12 the thought bubble over plaintiffs counsel's head in that
13 regard, so tell me what pieces of plaintiffs' request you
14 agree with and what pieces you don't agree with, and why
15 they shouldn't be concerned.

16 MR. ROBISON: Thank you, Your Honor. Yes, Brian
17 Robison for the defense side.

18 Last Thursday when we saw their section of the
19 joint report, that was the first time we had seen a
20 request -- kind of a broad-based request like this for
21 personal cell phone numbers.

22 Last July, the plaintiffs sent each defendant a
23 letter listing certain identified executives and asked us to
24 take steps to preserve the executives' devices, either
25 imaging them or doing something else to preserve them, and

1 we did that. We didn't think we were required to do it, but
2 to avoid a fight, we went ahead and took pretty expensive
3 steps to make sure those executives' devices were preserved.

4 This request, though, is a little different.
5 We're learning more on this call about exactly what they
6 have in mind and when. But to us, in our view, it's hard to
7 get our hands around exactly what's involved, exactly how
8 many devices we're talking about, how many phone numbers
9 we're talking about before we get further down the road in
10 negotiating who the actual custodians are.

11 Mr. Clark is right, in other cases there are
12 letters like this sent to cell carriers for personal phone
13 numbers, but they're not done now. They're not done when
14 there hasn't been discussion over who the custodians are
15 even likely to be.

16 So I guess our concern is, number one, we haven't
17 talked to them about exactly what they have in mind, and
18 exactly for how many people, and exactly when they want
19 these letters sent, so to us it kind of came out of the blue
20 and we hadn't had a chance to react to it. But now that
21 we're hearing more, it sounds like it's not something that
22 the plaintiffs are asking us to do today for all the people
23 listed on any org chart. It's more something that would be
24 done later once we've made some more progress on these
25 custodian negotiations. And if that's the case, then I

1 think our objections are starting to fade away, because then
2 we're not talking about doing it for literally thousands of
3 people's phone numbers when we know we're not going to have
4 thousands of document custodians.

5 THE COURT: Mr. Clark.

6 MR. CLARK: Yeah. I mean, just to be clear, we're
7 not agreeing that defendants ought not -- if they know that
8 certain employees were likely to be document custodians and
9 had communications with competitors they ought not to have
10 done this last June or July.

11 What we are saying now is that as we're --
12 especially, I guess, in the next week defendants are going
13 to have identified document custodians, we're saying
14 certainly by now there should be an effort to preserve those
15 people's relevant information, including their phone logs
16 that are held by phone carriers. So that's, I think, really
17 getting to the heart of what we're asking for here.

18 MR. ROBISON: Yeah, Your Honor. Brian Robison.

19 Just to react to that, I think there really has
20 been a disconnect here because previously when we received
21 the ESI protocols from the plaintiffs, there wasn't anything
22 in there about taking steps vis-a-vis third parties
23 vis-a-vis phone carriers. The requests in the E SI protocol
24 for cell phones was to gather up and disclose to them phone
25 numbers, cell carriers, communications apps, messaging apps,

1 that sort of thing, information that is unique to the person
2 and the phone. And we discussed that with you, Your Honor,
3 in November. We objected to disclosing that wholesale
4 because it's basically free discovery. The Court agreed
5 that we did not need to disclose that sort of detailed
6 information. We need to preserve it, and we've instructed
7 people to preserve things like this information that's on
8 their device -- messaging apps, phone numbers, cell carrier
9 information, all that -- so when people are deposed later,
10 the plaintiffs can ask about it again in a deposition.

11 This is the first time we're hearing that they
12 think we have an obligation to be notifying cell carriers to
13 preserve an unknown number of people's call logs. So I
14 really do think this is something that has not been fleshed
15 out in a meet and confer. It's something that is new. And,
16 like I said, to us we're willing to do this. It's just to
17 us a timing and a scope question. It's when do we do it and
18 for how many cell numbers.

19 THE COURT: All right. This does sound like an
20 issue where the parties need to talk further between
21 themselves, certainly until you all have kind of fully
22 engaged on what precisely the plaintiffs are seeking and
23 what precisely the defendants would be willing to agree to
24 and whatnot. I don't have enough information here, I think,
25 to provide any particularly intelligent guidance.

1 So I do think you ought to meet and confer on
2 this. I'm not sure I want to wait until the status
3 conference in July if there is a significant disconnect
4 between you on this, though.

5 So I think what I'd like to have you do is meet
6 and confer further on this. You're going to be talking
7 about custodians anyway over the next couple of weeks. Why
8 don't you get me a status update on this particular issue
9 let's say in 30 days. So if you could do a joint status
10 update to me in 30 days that tells me where you're at in
11 your conversation about this. Ideally you'll have come to
12 some agreement, either a concrete agreement or an agreement
13 about how you're going to get to an agreement. But give me
14 a status update, let me know where you stand, and based on
15 that I'll decide whether it would make some sense to try to
16 schedule an interim conference call for the purpose of
17 talking further about this or whether it looks like you're
18 on track and we don't need to talk before our early July
19 status conference. Does that make sense?

20 MR. CLARK: Brian Clark, Your Honor. Yes, that
21 does make sense.

22 MR. ROBISON: Brian Robison for the defense side.
23 Yes, that works just fine.

24 THE COURT: Okay. I think that covers the two
25 items on which plaintiffs had requested further discussion.

1 Is there anything that I've missed or anything that you
2 decided between yourselves after you wrote the letter that
3 you wanted to get on my radar?

4 MR. CLARK: Your Honor, for plaintiffs this is
5 Brian Clark. No, there is nothing else.

6 MR. ROBISON: Brian Robison for the defense side.
7 No, Your Honor, nothing else.

8 THE COURT: Okay. So we have a plan for getting a
9 date for the next status conference, we've got a plan for
10 moving forward on document custodians, and a plan for moving
11 forward on phone records. I will make sure that those items
12 are reflected in the minutes for this call. But if there's
13 nothing further, I think we can adjourn.

14 Thank you very much for your participation, and I
15 will look forward to talking with you in about
16 two-and-a-half months, if not before.

17 We're in recess.

18 (Court adjourned at 2:55 p.m.)

19 * * *

20 I, Debra Beauvais, certify that the foregoing is a
21 correct transcript from the record of proceedings in the
22 above-entitled matter.

23 Certified by: s/Debra Beauvais
24 Debra Beauvais, RPR-CRR
25